seeks, *inter alia* to compel Mrs. Davis to abandon her claim and in the alternative to recover from Mrs. Davis in Florida any amount that she might receive from the decedent's estate in Tennessee. Petitioners have been enjoined by the Probate Court of Davidson County, Tennessee, from pursuing their Florida action while the petition is being reviewed by this Court. Resp. App. E-3 to E-4. Mrs. Davis believes there is absolutely no merit to the action, nor even the right of Petitioners to bring it in Florida. However, the Probate Court has refused for now to order Petitioners to withdraw the Florida complaint. Resp. App. E-4. Meanwhile, Mrs. Davis filed a motion on September 26, 2005 seeking an indefinite extension of time to file an answer. Resp. App. F-1. At the date of submission of this brief, the Florida Circuit Court has not yet ruled. Thus, there are pending actions in two state courts involving the dispute between Petitioners and Mrs. Davis over the distribution of the Tennessee estate of the decedent.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE JURISDICTIONAL REQUIREMENTS OF 28 U.S.C. § 1257(a) HAVE NOT BEEN SATISFIED

Under 28 U.S.C. § 1257(a), Supreme Court review of state court decisions is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." *See also Florida v. Thomas*, 532 U.S. 774, 777 (2001); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306 (1989). As this Court stated in *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (Ginsburg, J.), "the finality rule 'is not one of those technicalities to be easily scorned.' It is an important factor in the smooth working of our federal system." The

state court decision can only be reviewed if it is final in two respects: "it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Id. See also Market St. Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it" and will not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

In the present case, Petitioners prematurely seek review by this Court. There are five important grounds for concluding that the finality rule of 28 U.S.C. § 1257(a) has not been satisfied.

A. Petitioners Have on Multiple Occasions Asserted in Writing That Mrs. Davis' Claims Have Not Yet Been Finally Resolved

Shortly before filing their petition in this Court, Richard Bird, counsel for Petitioners, wrote on June 28, 2005, in a letter to Mrs. Davis' counsel:

> In response to your letter of May 17, 2005 and the more recent letters, *we do not agree that the claims of Dorothy Davis are finally resolved in her favor*. This response and the information furnished are without waiving any rights, claims, defenses, setoffs, counter-claims or other actions and recourses available to the Executors for the benefit of the Estate.

Resp. App. A-1 (emphasis added).

Mr. Bird reiterated Petitioners' stance in another letter dated July 20, 2005: "As I have advised in previous

correspondence, it is not considered that the claims of Dorothy Davis against the estate are finally resolved." Resp. App. B-1.

This Court should take Petitioners' written concessions as to the lack of finality at face value. Petitioners clearly believe that they have "rights, claims, defenses, setoffs, counter-claims or other actions and recoveries available" which could only be raised in state court and not before this Court. To date they have demonstrated every intention of pursuing remaining avenues in state court, as is evidenced by the recent filing of a complaint in Florida Circuit Court.

B. The Controversy Is Still Being Litigated in the State Courts of Florida and Tennessee

On July 19, 2005, only ten days before filing their petition in this Court, Petitioners filed a complaint in the Circuit Court for the Fifteenth Judicial Circuit In and For Palm Beach County, Florida. Resp. App. D-1 to D-9. The complaint sets forth counts for money damages, specific performance, and declaratory judgment. The prayer for relief requests a determination by the court (i) that the antenuptial agreement is valid and enforceable, (ii) that Mrs. Davis has no right to pursue her statutory rights in Tennessee, (iii) that she be ordered to execute a waiver of all such rights and dismiss her "pending" Tennessee claims, and (iv) that if Mrs. Davis recovers in Tennessee that she be required to turn over to Petitioners monetary damages "in the amount of [her] recovery for elective share, homestead, exempt property, and a years' [sic] support allowance." *Id.* at D-9.

In the event the Florida court were to rule in Petitioners' favor, the practical consequence would be the denial of the Tennessee statutory rights that Mrs. Davis claims. Were this to occur, Petitioners would not require review by

this Court. On the other hand, Mrs. Davis might well challenge the jurisdiction of the Florida court and also raise a host of procedural and substantive arguments, including the question pretermitted by the Tennessee Court of Appeals as to whether she signed the antenuptial agreement under duress. Pet. App. A-15. Mrs. Davis might eventually petition this Court with her own Full Faith and Credit claim, although it would be of a very different sort from the one being asserted now by Petitioners.

On the other hand, if Petitioners were barred from pursuing their claims in Florida by the Tennessee courts, which exercise supervisory authority over them, or if Petitioners were allowed to proceed but then lost in the Florida courts, they could at that point petition this Court and raise the very same federal question they are presently raising. There might be finality at that time, unlike now. Accordingly, this Court should not grant the petition prematurely when the ultimate shape of the litigation and the nature of the decisive federal question is not yet clear.

C. When a Decision of a Lower State Court Is Reversed and Remanded for Proceedings Consistent with the Opinion, as in This Case, the State Court Judgment Is Not Yet Final

The Tennessee Court of Appeals reversed the summary judgment granted by the Probate Court and remanded "for further proceedings consistent with this opinion." Pet. App. A-15. Accordingly, the judgment of the Court of Appeals is not final for purposes of the Supreme Court's jurisdiction under 28 U.S.C. § 1257(a). *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). As was previously discussed, to be

final, a judgment must be final in two respects: "it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of the final court." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (quoting *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945)). *See also Collins v. Miller*, 252 U.S. 364, 370 (1920) (the judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all causes of action involved").

The dispute between Petitioners and Mrs. Davis simply does not meet these criteria. As has been discussed, there are currently proceedings in the Circuit Court for the Fifteenth Judicial Circuit In and For Palm Beach County, Florida, and in the Probate Court, Davidson County, Tennessee. The Tennessee Court of Appeals' decision, under these circumstances, cannot be said to be "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." It certainly is not "the final word of the final court."

Indeed, this Court has routinely held that the need to determine damages or other appropriate relief on remand means that the determination of the state courts is not yet final, even if the federal question is not likely to arise again in the proceedings. *See, e.g., Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948); *Houston v. Moore*, 16 U.S. (3 Wheat) 433, 434 (1818); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 632-33 (1981); *O'Dell v. Espinoza*, 456 U.S. 430 (1982). Likewise, when an accounting remains, a state court determination of the federal question is not final, except when the state court has ordered an immediate transfer of property causing irreparable harm. *See, e.g., Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948) ("an order decreeing immediate transfer of possession of physical property is

final for purposes of review .... But [a taking] ... where the amount of compensation has not been determined, is not deemed final, certainly where the property will not change hands until after the award of compensation"). No such immediate transfer of property has been ordered by the Tennessee Court of Appeals.

If a trial court only has ministerial acts to fulfill on remand, there is finality to the appellate court judgment. *See, e.g., Department of Banking v. Pink,* 317 U.S. 264, 267 (1942). However, that is not the case here. Apart from the counterclaims, setoffs and other defenses that Petitioners assert are still available and, in fact, are pursuing in the *state* courts of Florida, vital determinations remain to be made in the Davidson County Probate Court in Tennessee: the assets constituting the estate; the value of the decedent's estate; whether assets transferred during life should be included for elective share purposes; whether assets should be liquidated to satisfy the elective share in cash; the style of living of the Davises at the decedent's death for purposes of determining the statutory year's allowance; and the personal property of her husband to which Mrs. Davis is entitled under the exempt property statute. These are not ministerial acts and demonstrate that the Probate Court's summary judgment was merely an interlocutory or intermediate step in the estate litigation.

D. The Federal Question Raised in the Petition Had Not Been Previously Raised in the State Courts

In order for the United States Supreme Court to exercise jurisdiction under 28 U.S.C. § 1257(a), a substantial federal question must have been properly raised in the state courts. *See, e.g., Zucht v. King,* 260 U.S. 174, 176 (1922). One important reason for insisting that state

courts be given the first opportunity to pass on federal claims is the Court's oft-repeated acknowledgment of state court competence to adjudicate federal constitutional claims. *See, e.g., Allen v. McCurry,* 449 U.S. 90, 105 (1980). *See also* Robert L. Stern et al., *Supreme Court Practice* 169 (8th ed. 2002). This principle of state court competence is invested with so much importance by the Court that it has held that "[b]y failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court." *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 483 n.16 (1983). As stated in this Court's recent decision in *Adams v. Robertson,* 520 U.S. 83, 90 (1997), "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider."

For these reasons, the Supreme Court has held on numerous occasions that the petitioner has the "high burden" of establishing that the federal question was properly raised, so that the failure of the state court to deal with it was not for want of proper presentation. *See, e.g., Campbell v. Louisiana,* 523 U.S. 392, 403 (1998); *Adams v. Robertson,* 520 U.S. 83, 86 (1997).

In their briefs before the Tennessee Court of Appeals and the Tennessee Supreme Court, Petitioners did, in fact, raise a Full Faith and Credit claim. However, it was a strikingly different Full Faith and Credit claim than the claim raised in their present petition before this Court. Accordingly, neither the state courts of Tennessee nor Mrs. Davis were ever given an opportunity to address the federal constitutional claim in the prior state proceedings and had no reason to anticipate it.

In its most recent decision on the issue, this Court emphasized the requirement that the federal claim must

have been presented in the state courts with "fair precision and in due time." *Adams v. Robertson,* 520 U.S. 83, 88 (1997). Important policies are served by this requirement, which is alternatively cast as jurisdictional or prudential, but if the latter, entitled to no less respect. *Id.* at 90. By requiring state court consideration of the claim first, the interest of comity is served and the possibility of resolution on alternative state grounds is fostered, thereby avoiding unnecessary Supreme Court adjudication. Furthermore, it assures the creation of a more adequate factual and legal record in the Supreme Court, and permits the parties to test and refine their positions, thus enhancing the Court's own understanding.

In *Adams,* petitioners had raised in a heading of an argument in their brief in state court the argument made in their petition for writ of certiorari, that minimum due process required that class members be permitted to opt out of a class. However, the discussion under the heading in their state court brief only addressed due process in the sense of the lack of personal jurisdiction over out-of-state class members. For that reason, the Court denied their petition.

In the Tennessee Court of Appeals in the present case, Petitioners actually took the position, without reservation, that Tennessee could apply its law based on its own public policy. Petitioners simply argued that "[b]efore declaring a contract void on public policy grounds, a court must determine that no doubt exists that enforcing the contract would clearly prejudice the public interest" when applied to the particular facts. Pet. Br. in Tenn. Ct. App. 14, 19. They argue in their brief before this Court precisely the contrary, that a forum-centered analysis is constitutionally infirm and must give way to an indeterminate "multidimensional analysis" that takes account of "the forum's obligations to other states." Pet. Cert. 10-11. Thus, Petitioners now challenge in this Court the very reasoning of

their Full Faith and Credit claim in the Tennessee Court of Appeals.

In sum, neither the Tennessee courts nor Mrs. Davis were previously alerted to the Full Faith and Credit claim now raised by Petitioners for the first time in their brief before this Court. The fact that the claims in the state court and before this Court are both generically identified as Full Faith and Credit claims is not enough to satisfy Petitioners' "heavy burden" to raise the federal question in the state courts, *see Campbell v. Louisiana,* 523 U.S. 392, 403 (1998); *Adams v. Robertson,* 520 U.S. 83, 86 (1997), and make their federal question argument with "fair precision," *Adams v. Robertson,* 520 U.S. at 88. This is especially true here, since their state court and Supreme Court positions on the obligations of the forum under the Full Faith and Credit Clause are in direct and stark conflict.

Petitioners' disregard of the principle that federal questions must first have been raised and finally resolved in the state court proceedings is also strikingly evidenced by a related claim that Petitioners raise for the first time in this Court. They urge the Court to use this case as a vehicle for establishing the principle of separate marital domiciles for spouses who have separate individual domiciles. Pet. Cert. 19. However, this issue was not raised or even hinted at in the state court proceedings. Neither Mrs. Davis nor the Tennessee state courts ever had an opportunity to address it.

E. None of the Exceptions of *Cox Broadcasting Corp.* Are Applicable

In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477 (1975), the Supreme Court identified four narrow categories of cases in which a state judgment might be considered final, even though there are further proceedings in

the lower state courts to come. The first category is one in which there are further proceedings, but "the federal issue is conclusive or the outcome of further proceedings preordained." The present case does not fit within this category. Petitioners' counsel has affirmatively stated that Petitioners have other grounds on which they could prevail. Resp. App. A-1, B-1. Furthermore, if Petitioners succeeded in their lawsuit in Florida, the federal question would be mooted. In addition, Mrs. Davis could still challenge the validity of the waiver on the ground of duress. Thus, at this stage the federal question can hardly be regarded as conclusive.

The second category referred to in *Cox Broadcasting Corp.* involves cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of the future state-court proceedings." 420 U.S. at 480. Again, this case does not fit within this category. As has already been explained, Petitioners apparently believe they can prevail in Tennessee or Florida on state law or other federal law grounds, thus obviating the need to ever consider the federal question presented to this Court by Petitioners.

The third category refers to "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case." *Id.* at 481. The present case does not fit in this third category either. Were Petitioners to lose after having exhausted all avenues in Tennessee and Florida now available to them, the federal question could then be presented to this Court, at a time when there would truly be a final judgment in the state courts.

The last category involves those situations:

> where the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-83. In this case, were the Tennessee Court of Appeals' determination to be reversed, this would not be preclusive of further litigation on the cause of action. For example, the Tennessee Court of Appeals explicitly stated that "our holding on the issue of public policy makes it unnecessary for us to address the issue of duress." Pet. App. A-15. Were the public policy ground barred, Mrs. Davis could still proceed with her claim for statutory rights and the invalidity of the waiver based on the theory of duress.

Clearly, none of the categorical exceptions of *Cox Broadcasting Corp.*, which are to be applied narrowly, are applicable. Equally significant, the nature of the federal question may alter as the litigation develops. For example, if the petition is denied but Petitioners somehow prevailed in the Florida courts, then Mrs. Davis, rather than Petitioners, may be making a full faith and credit argument – specifically, that Florida must give full faith and credit to a Tennessee *judgment*. Thus, to proceed now would encourage fragmentary review, an outcome firmly disfavored by this Court. As was stated in *Radio Station WOW v. Johnson*, 326 U.S. 120, 127 (1945), "Of course, where the remaining litigation may raise other federal questions that may later come here . . . to allow review of an intermediate

adjudication would offend the decisive objection to fragmentary reviews."

II. PETITIONERS HAVE FAILED TO COMPLY WITH THE MANDATE OF SUPREME COURT RULE 14.1(g)(i)

Under Supreme Court Rule 14.1(g)(i), if review of a state court judgment is sought, a petition for writ of certiorari "shall" contain "specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Petitioners' brief fails to comply with this mandatory rule.

In *Adams v. Robertson,* 520 U.S. 83 (1997), the Court refused to reach the federal question raised by the petitioner because of the petitioner's noncompliance with Rule 14.1(g)(i). The respondent in that case had failed to comply with Rule 15.2, which requires a respondent to bring a violation of a rule by the petitioner to the Court's attention in the brief in opposition and not later. Without minimizing the respondent's failure to satisfy this obligation, the Court, nevertheless, held that "we find no interest in penalizing the failure of counsel to comply with Rule 15.2 that overrides the interest of comity or the value to this Court for a fully developed factual and legal record upon which to base decisions." *Id.* at 92.

The Court in *Adams* also rejected the argument that the significance of the underlying issue should override

enforcement of a technical rule. The Court relied on its decisions in *Ticor Title Insurance Co. v. Brown,* 511 U.S. 117 (1994) (per curiam), and *Illinois v. Gates,* 462 U.S. 213, 224 (1983). In the latter of these cases, the Court stated that by "adher[ing] scrupulously to the customary limitations on our discretion" by application of the Rules, "we promote respect ... for the Court's adjudicatory process." *Gates,* 462 U.S. at 224. Inasmuch as Petitioners have completely ignored the mandate of Supreme Court Rule 14.1(g)(i), their petition should be denied.

III. TENNESSEE HAS A SIGNIFICANT AGGREGATION OF CONTACTS SO THAT APPLICATION OF ITS LAW IS CONSTITUTIONALLY PERMISSIBLE UNDER THIS COURT'S RECENT UNANIMOUS DECISION IN *FRANCHISE TAX BOARD V. HYATT*

For the reasons stated below, Petitioners' arguments are without merit. In particular, this Court's recent unanimous decision in *Franchise Tax Board v. Hyatt,* 538 U.S. 488 (2003) and its earlier landmark decision in *Allstate Insurance Co. v. Hague,* 449 U.S. 302 (1981) are dispositive.

A. This Court's Recent Unanimous Decision in *Franchise Tax Board v. Hyatt* Is Controlling Precedent

This Court's decision in *Franchise Tax Board v. Hyatt,* 538 U.S. 488 (2003), is controlling precedent and entirely dispositive of the matter. When an earlier Supreme Court decision has so explicitly addressed and resolved the question raised, the substantial federal question requirement is not satisfied and certiorari must be denied. *See, e.g., Palmer Oil Corp. v. Amerada Corp.,* 343 U.S. 390, 391-92 (1952); *Zucht v. King,* 260 U.S. 174, 176-77 (1922);

Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308, 311 (1902).

In *Franchise Tax Board,* 538 U.S. 488 (2003), the Nevada Supreme Court refused to apply a California statute immunizing its tax collection agency from private lawsuits. Unlike California, Nevada law had waived sovereign immunity with respect to intentional torts. In a *unanimous* opinion, per Justice O'Connor, this Court first drew a sharp distinction in the application of the Full Faith and Credit Clause between foreign state judgments and foreign state laws. In the case of judgments, the Full Faith and Credit Clause is "exacting." *Id.* at 494. However, "it is less demanding with respect to choice of laws." *Id.* Specifically, the Court quoted from its earlier decision in *Sun Oil Co. v. Wortman,* 486 U.S. 717, 722 (1988), which quoted the earlier decision in *Pacific Employers Insurance Co. v. Industrial Accident Commission,* 306 U.S. 493, 502 (1939), for the governing principle that the "Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"

In their brief, Petitioners strikingly fail to recognize the distinction in treatment of foreign state *judgments* and foreign state *laws* under the Full Faith and Credit Clause. Indeed, Petitioners rely heavily on *Baker v. General Motors Corp.,* 522 U.S. 222 (1998). However, theirs is a troubling mischaracterization of the holding in *Baker.* The language from *Baker* quoted in Petitioners' brief actually only refers to *judgments* and, indeed, the Court is careful to italicize the word "judgments" to distinguish it from *laws* of another state. *Id.* at 233. The present case involves laws, *not* judgments.

The state of California argued in *Franchise Tax Board* that a new rule was needed to protect core constitutional

interests. This Court rejected the call to frame a new rule of law and ignore binding precedent. It emphasized that it had unequivocally abandoned its prior balancing-of-state-interests conflict of laws approach. 538 U.S. at 495. Indeed, Justice O'Connor, for the Court in *Franchise Tax Board,* concluded her opinion by warning that "[w]ithout a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause." *Id.* at 499.

Although not calling it "balancing" or "weighing," Petitioners are urging on this Court a return to an analytic process that inevitably will require "balancing" and "weighing" in one form or another. This so-called "multi-dimensional" approach deviates markedly from the evolving practice of this Court over the past half century beginning with such cases as *Carroll v. Lanza,* 349 U.S. 408 (1955) and *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66 (1954). This contemporary jurisprudence has largely displaced the decisions from the 1930s and earlier relied on so heavily by Petitioners in their brief. More recent cases like *Franchise Tax Board, Sun Oil Co. v. Wortman,* 486 U.S. 717 (1988) and *Nevada v. Hall,* 440 U.S. 410 (1979) all return to the central principle set forth in *Pacific Employers Insurance Co. v. Industrial Accident Commission,* 306 U.S. 493, 502 (1939), which bears repeating: "[T]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"

This principle cuts forum states a wide swath in deference to our union of coequal sovereign states. Nevertheless, there are certain limits on a state's power to pursue its public policy by applying its own law. The forum state can apply its law so long as the subject matter is "a subject matter concerning which [the forum state] is

competent to legislate." *Franchise Tax Board*, 538 U.S. at 494. *See also Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988). If it is competent to legislate, then the forum can apply its own law, regardless of interests or contacts of other states. If it lacks the competence, then it cannot apply its own law at all.

When is a state "competent to legislate" and thereby to choose to apply its own law? This Court, in *Franchise Tax Board*, quoted from *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), and *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981): "'[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Franchise Tax Board*, 538 U.S. at 494, 495.

Allstate Insurance Co. clarifies contacts that will be deemed "significant." The contacts of Tennessee in the present case easily meet and exceed the contacts that were held to satisfy the standard in *Allstate Insurance Co.* In that case the plurality opinion identified three contacts that the forum, Minnesota, had. First, Mr. Hague, whose wife was seeking a recovery from an insurer for her husband's motorcycle-related death, had commuted to work in Minnesota on a routine basis, although he was not commuting when he died. The opinion emphasized that membership in the state workforce was an important contact though it implicates "a state interest less substantial than does resident status." 449 U.S. at 314. In the present case, the decedent was a resident of Tennessee at all times. The Record establishes that Mrs. Davis was also a resident of Tennessee at the critical moment of the decedent's death. R. vol. I, at 1. Just as Minnesota's work

force is affected by the level of protection the state extends employees at the time of death, *id.* at 315, so, too, Tennessee's resident surviving spouses are affected by the protection Tennessee affords them and the criteria it utilizes in determining if they have waived those protections.

The second factor that Minnesota could claim in *Allstate Insurance Co.* as a contact was the insurer's presence at all times in Minnesota. Thus, it should have been familiar with the prospect that the state would apply forum law. There was "no element of unfair surprise or frustration of legitimate expectations." *Id.* at 318 n.24. Likewise, in the present case, the decedent knew he was a lifetime Tennessee domiciliary, whose assets were located primarily in Tennessee, and whose estate would likely be administered in Tennessee and not Florida. He had attorneys who could have informed him that Tennessee statutory and case law had for decades not enforced *lex loci contractus* when the contract violated Tennessee public policy. *See, e.g., Bowman v. Price,* 226 S.W. 210, 214 (Tenn. 1920). He should also have known that full and fair disclosure was another important public policy of his domicile when considering the validity of antenuptial agreements waiving statutory rights of a surviving spouse. Moreover, the decedent's expectations, if any, were certainly not "legitimate." As the Court of Appeals pointedly explained, "the parties to this action do not dispute that the Davises' antenuptial agreement was entered into by the parties without full and *fair* disclosure." Pet. App. A-14 (emphasis added).

The third and final factor in *Allstate Insurance Co.* contributing to Minnesota's significant aggregation of contacts was the surviving spouse's Minnesota residence at the time the litigation commenced. Even though she became a resident just as the suit commenced, the Court still credited the state with this contact. In Mrs. Davis'

case, she had been a resident of Tennessee well before Mr. Davis' death and the commencement of this litigation.

B. Tennessee Has a Particularly Significant Aggregation of Contacts

The actual extent of Tennessee's contacts are considerably more extensive than those identified in *Allstate Insurance Co.* When a surviving spouse of a Tennessee domiciliary executes a valid waiver as part of an antenuptial agreement, the surviving spouse is foregoing valuable statutory rights granted by the legislature of *Tennessee* in conjunction with the distribution of the *Tennessee* property of a *Tennessee* domiciliary. The waiver relates directly to how much the surviving spouse and other devisees will inherit pursuant to the inheritance law of *Tennessee*. It affects deeply the relationship of Tennessee domiciliaries to their spouses and the trust and confidence that parties bring to the institution of marriage. This is especially true when, as here, the surviving spouse is a resident of Tennessee at the time of her spouse's death.

Furthermore, the very Petitioners who now claim that Tennessee has no interest were the ones who initiated the probate proceeding in Tennessee and not in Florida. They sought the assistance of the *Tennessee* courts in assuring the efficient and proper distribution and administration of the estate of a Tennessee domiciliary. They derive their very authority as J.D. Davis' legal successor from their appointment by the Tennessee courts, which they sought out. They remain accountable to this day to the Tennessee courts and those of no other state. They asked the Tennessee courts to find Mrs. Davis' statutory claims invalid under *Tennessee* law and, having been repudiated by the Tennessee courts, they now assert that those courts had no authority to determine the very issue they presented.

In contrast, even assuming Mrs. Davis was and is a Florida domiciliary, one struggles to identify Florida's interest in denying one of its widowed domiciliaries property that another state, Tennessee, is willing to give to her. Florida certainly has no interest in diminishing the take of one of its domiciliaries so as to enhance the inheritances of Petitioners, who are not Florida domiciliaries or residents. R. vol. I, at 1.

C. Tennessee Acted Sensitively and Respectfully with Regard to Florida's Law

Even though Tennessee easily satisfies the aggregation of significant contacts test, the Court in *Franchise Tax Board* did indicate another basis for disallowing the forum's application of its public policy, that is, when the forum state exhibits "'a policy of hostility to the public Acts' of a sister State." 538 U.S. at 499 (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). A fair reading of the opinion of the Tennessee Court of Appeals leaves no doubt but that the Court of Appeals went well beyond what was constitutionally required in showing sensitivity to the Florida law. With great care and detail, it analyzed that law and then contrasted it with Tennessee's. The Court explicitly identified the legitimate policies it was pursuing – the encouragement of the utmost good faith between spouses, one of whom was a domiciliary of the state and the other a resident, and the assurance that spousal waivers in "a probate proceeding which could occur only in Tennessee" are entered into knowledgably or with full and fair disclosure. Pet. App. A-14.

D. Tennessee Law, Like the Law of Virtually Every Other State, Requires a Higher Degree of Disclosure by the Parties in the Case of an Antenuptial Agreement than in the Case of an Ordinary Commercial Agreement

Tennessee, like virtually every other state in the country that grants statutory rights at death to a surviving spouse, requires a higher degree of disclosure or knowledge with respect to waivers of such rights by antenuptial agreement than in the case of ordinary commercial contracts. Indeed, there appear to be only three exceptions – Florida, New York, and Georgia. *See* Jeffrey A. Schoenblum, 2005 Multistate Estate Planning Guide Table 6.04 (2005). Far from asserting a novel public policy in this case, Tennessee is merely seeking to assure the preservation of rights that are widely recognized nationally. Furthermore, Tennessee's mainstream approach belies any suggestion that its enforcement of such rights "exhibits a 'policy of hostility to the public Acts' of a sister State." *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 499 (2003) (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)).

Nevertheless, Petitioners cite *Soloman v. Murrey*, 103 S.W.3d 431, 434 (Tenn. Ct. App. 2002) for the proposition that in Tennessee antenuptial agreements are "interpreted and enforced like any other contracts." The *Soloman* court, however, actually proceeds to offer the following vital caveat with respect to antenuptial agreements: "the courts must closely examine the circumstances of their formation, to make sure [antenuptial agreements] have been entered into freely, knowledgably, and in good faith, without duress or undue influence." *Id.* (citing *Randolph v. Randolph*, 937 S.W.2d 815 (Tenn. 1996); *Wilson v. Moore*, 929 S.W.2d 367 (Tenn. 1996)). Indeed, the Tennessee Supreme Court has been consistent over the years, most

recently in *Bratton v. Bratton*, 136 S.W.3d 595 (Tenn. 2004), as has the Tennessee legislature via Tenn. Code Ann. § 36-3-501, in holding antenuptial and postnuptial agreements to a higher standard than the typical commercial contract. Because marriage is involved, the highest degree of fiduciary duty between the parties is called for. As the Court of Appeals in the present case stated, "An engagement to marry creates a confidential relation between the contracting parties and an antenuptial agreement contract entered into after the engagement and during its pendency must be attended by the utmost good faith." Pet. App. A-13 (quoting *Bratton v. Bratton*, 136 S.W.3d at 601). *See also* Eugene Scoles, et al., *Conflict of Laws* § 18.19 (3d ed. 2000) (recognizing that choice-of-law principles applicable to ordinary commercial contracts properly should not apply to succession-related contracts).

E. The Court Should Not Unsettle the Venerable and Established Conflict of Laws Principles in This Area of Law

With Court precedent settled in Mrs. Davis' favor, Petitioners rely to a large degree on several law review articles and other secondary sources for support. Petitioners refer to certain scholars, such as Professors Weintraub and Laycock, without noting that these very scholars' theories have come under withering assault from other conflicts scholars. *See, e.g., A Conflict-of-Laws Anthology* chs. 6, 10C (Gene R. Shreve, ed., 1997). Indeed, as this Court stated in *Sun Oil v. Wortman*, 486 U.S. 717, 728-29 (1988), "In sum, long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional. . . . It is not the function of this Court, however, to make departures from established choice-of-law precedent and practice constitutionally mandatory."

Moreover, a review of the secondary sources relied upon by Petitioners reveals a less than precise presentation. A critical example is Petitioners' reliance on the Restatement (Second) of Conflict of Laws § 6. Petitioners cite this section for the principle that a variety of factors have to be taken into account. However, that section defers to a more specific provision, § 265. Section 265 specifically provides for the application of the law of the *decedent's* domicile in determining a surviving spouse's rights, including the validity of an antenuptial agreement that opts expressly or implicitly for a different governing law. As Comment *b* of § 265 makes clear, the domicile "might" apply a different law, but is by no means required to do so, even when there has been an explicit and knowing designation of a different law in the waiver.

The common law also strongly supports the principle that the conflicts rules applicable to ordinary contracts do not apply when the waiver of statutory rights associated with succession is involved. In the principal contemporary common law precedent, *In re Bulova's Will,* 14 A.D.2d 249, 220 N.Y.S.2d 541 (App. Div. 1961), the Appellate Division of the New York Supreme Court held that the law of New York, where the probate proceedings were and the decedant was domiciled, governed. This was held to be the case even though the waiver of statutory rights by way of a postnuptial agreement had been executed out-of-state. The Court stated that "the mere fact an instrument is a contract does not mean that the conflict rules to be applied are those associated with contract but, rather, may be and would most likely be those associated with the jural relations directly affected by provisions of the agreement." 14 A.D. at 255, 220 N.Y.S.2d at 547. The *Bulova* court went on to state: "Hence, it is one or more of the specialized rules applicable to conveyances, elections, releases, waivers, and the like, rather than the more generalized one based on the place of contracting which determine the

formalities required for the execution of the [postnuptial] agreement." 14 A.D. at 255-56, 220 N.Y.S.2d at 547.

Bulova follows upon the venerable *Emery v. Burbank*, 163 Mass. 326, 329, 39 N.E. 1026, 1027 (1895), in which then-*Massachusetts* Justice Oliver Wendell Holmes concluded that Massachusetts law governed, even though it invalidated an oral contract to make a will, which was valid where and when made in Maine. Justice Holmes explained that "the final domicile [of the decedent] is more concerned in the policy to be insisted on [when the decedent's estate is affected] than any other jurisdiction." *Id.*, *see also Rubin v. Irving Tr. Co.*, 305 N.Y. 288, 301-02, 113 N.E.2d 424, 429 (1953) (holding that New York courts could refuse to enforce an oral contract not to change a will executed in and valid under Florida law because New York had the most significant contacts in that the property at issue was in New York where decedent had been domiciled and where performance on the contract would take place). As another leading and influential conflicts scholar, Professor Robert Leflar, wrote in a passage quoted by the *Bulova* court: "At the same time it must be remembered that, apart from the contract itself, legal effect upon titles in particular property is controlled by the law that governs the property as such, often a different law from that which governs the contract." 14 A.D.2d at 257, 220 N.Y.S.2d at 548.

Even were the Court so inclined to take on the Herculean and inevitably frustrating chore of developing a coherent national system of conflicts guidelines, the facts of this case are not the appropriate vehicle. If there is one area of conflicts law where there are settled rules, it is succession law, including the waivers that directly impact on the inheritance claims of interested persons.

F. The Constitutional Principle Urged by Petitioners Would Have a Severely Destabilizing Effect Nationally on State Inheritance Law

A choice of law principle that would require the probate court at the decedant's domicile to refer to the standards of a different state when determining whether statutory benefits granted by the forum state had been properly waived would complicate and delay the inheritance process and drive up the expense of probate. It would contribute considerable unpredictability as local probate judges and probate lawyers sought to determine accurately the subtleties of foreign law and the domiciliary status of the surviving spouse. It would introduce lack of uniformity with respect to the claims of surviving spouses of local decedents, if their particular rights hinged exclusively on where the agreement had been executed. It would encourage unscrupulous spouses and fiancés to plan the execution of the waiver in one of the few states like Florida where financial disclosure is not required.

By way of contrast, reference to the law of the decedent's domicile and primary probate assures reference to the same law for all surviving spouses, more efficient resolution of the probate process and distribution of estate property, and denial of opportunity to wily spouses to bypass statutory rights afforded their surviving spouses by execution of the waiver in certain lenient states. The interest of the domicile in assuring that its citizens exercise the utmost good faith in their marriages would also be furthered.

The current approach of reference to the law of the domicile of the decedent does not deny the parties the opportunity to enter into a reciprocal waiver of statutory

rights. That can readily be accomplished by simply disclosing to each other their finances so that they each enter into the antenuptial agreement "knowledgeably."

G. Tennessee Has a Vital Interest in Resident Surviving Spouses, of Which Mrs. Davis Was One at the Time of Her Husband's Death

Apparently in an effort to create an impression of a strong and enduring link exclusively with Florida, Petitioners repeatedly assert that Mrs. Davis was a domiciliary of Florida not only at the time that the antenuptial agreement was executed but afterwards. There is absolutely nothing at all in the Record to support this unsubstantiated statement. Petitioners cannot possibly determine from the Record what Mrs. Davis' status was after she married. Indeed, she might even have become a domiciliary of Tennessee, whether or not she retained her domicile in Florida. *See, e.g., Worcester County Tr. Co. v. Riley,* 302 U.S. 292 (1937).

By way of contrast, the Record is rich with evidence that, at the time of her husband's death and in the immediately preceding years, Mrs. Davis was not only physically a resident of Tennessee, but that she personally considered herself a resident of the state and Petitioners considered her to be a Tennessee resident as well. Notably, in their Petition for Probate, Petitioners identified Mrs. Davis' residence as "4507 Price Circle Road, Nashville, TN 37205." R. vol. I, at 1. They did not list or indicate a Florida residence or domicile. On federal income tax returns for the last full three years of their marriage, 1999-2001, Mrs. Davis and her husband filed joint returns with only a Tennessee address listed. R. vol. II, at 160, 163, 166. On September 23, 2002, Mrs. Davis filed a claim against the estate with the Probate Court. She identified

herself as the claimant and listed her address as "4507 Price Circle Road, Nashville, TN 37205." R. vol. I, at 41. When her attorneys submitted petitions for her statutory rights, she was copied on all filed documents, with only a Nashville address listed. R. vol. I, at 53, 58, 63, 68.

One of Petitioners' major arguments is that Mrs. Davis had no connection with Tennessee. They completely overlook her connection as a resident. In many respects, residence is actually a more significant day-to-day practical affiliation than domicile. Tennessee, as every other state, has a very real interest in assuring that resident surviving spouses, and often their minor children, are adequately provided for so that they do not become a burden on the state in which they reside. This is a sound public policy, as is encouraging the utmost good faith between resident spouses in their dealings with each other.

IV. CONCLUSION

For these reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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Counsel of Record
BASS, BERRY & SIMS PLC
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615-742-7730

and

JEFFREY A. SCHOENBLUM
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APPENDIX A

BAKER
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BERKOWITZ, PC

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June 28, 2005

Overton Thompson, III, Esq.
Bass, Berry & Sims
Suite 2700, AmSouth Center
315 Deaderick Street
Nashville, TN 37238-3001

VIA HAND DELIVERY

Re: Dorothy L. Davis/Estate of J.D. Davis, Deceased

Dear Overton:

In response to your letter of May 17, 2005 and the more recent letters, we do not agree that the claims of Dorothy Davis are finally resolved in her favor. This response and the information furnished are without waiving any rights, claims, defenses, setoffs, counter-claims or other actions and resources available to the Executors for the benefit of the Estate.

As you are fully aware, the Executors have followed and fulfilled their responsibility to uphold the Will of the Decedent and contractual commitments made during his lifetime. This has included following the terms of the Will and providing Dorothy Davis with the personal and financial benefits granted to her by the terms of the Will until recent date.

There is really very little pertinent information about the Estate which is not already known to you and your client. Enclosed for reference is a copy of the Estate Inventory filed by the Executors on August 6, 2002, a copy of which was duly furnished to counsel for Mrs. Davis. Also enclosed are copies of the Federal Estate Tax return (Form 706) and the Tennessee Inheritance Tax return which give the details and values for every asset.

Much of the requested information is moot and not relevant. By an agreement signed by Mrs. Davis on April 3, 2004, she specifically waived and released all of her rights and interests in the personalty in the Nashville residence.

The value of the estate is substantially the interests in the limited partnerships, all of which are minority interests. You are aware of the sale of the interest in Boulevard Terrace Rehabilitation and Nursing Center, LP and have a letter giving complete details. I do not have the most current information on Items 6 f-i but the values are minimal. The last I heard about Meecham and Company it was a plan to liquidate by the operating owner. Recently and at some expense, one of the oil leases is producing but there is a pending suit by the land owner seeking to terminate the lease.

As you are well aware, the Price Circle residence was sold and Mrs. Davis received a cash portion of the proceeds and signed a release.

Also enclosed is a copy of the last accounting filed with the Court.

This letter and the enclosures fairly well answer all of your inquiries about the Estate. As stated above, this information is furnished voluntarily and without any waiver of any kind.

Very truly yours,

BAKER, DONELSON,
BEARMAN, CALDWELL
& BERKOWITZ, PC

/s/ Richard D. Bird
Richard D. Bird

RDB:vmr

Enclosures

cc: Julie Griffin
Doug Davis
T.O. Helton
(All without enclosures)

APPENDIX B

BAKER
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BERKOWITZ, PC

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July 20, 2005

Overton Thompson, III, Esq.
Bass, Berry & Sims
AmSouth Center, Suite 2700
Nashville, TN 37238-3001

Re: Estate of J.D. Davis/Dorothy Davis

Dear Overton:

To supplement the material previously furnished, enclosed are copies of the 2004 Schedule K-1's in the following minor interests in the estate:

Valley View, Ltd.
Glen Valley Apartments & Duplexes
Sycamores Apartments
Sycamores Terrace, LLC
Somerset Village Apartments
BTRNC, LLC (sold)
Boulevard Terrace Rehabilitation
& Nursing Center, LP (sold)

Based on the most recent information, Meacham and Co. has little if any value. Last I saw, the other 50% partner offered $700 for the 50% interest owned by the estate.

As I have advised in previous correspondence, it is not considered that the claims of Dorothy Davis against the estate are finally resolved.

Very truly yours,

BAKER, DONELSON,
BEARMAN, CALDWELL
& BERKOWITZ, PC

/s/ Richard D. Bird
Richard D. Bird

RDB:vmr

Enclosures

cc: Julie Griffin (via email, w/o enclosures)
Doug Davis (via email, w/o enclosures)

APPENDIX C

[SEAL] Court of Appeals – Middle Division
100 Supreme Court Building
401 7th Avenue North
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Overton Thompson
Bass, Berry & Sims PLC
AmSouth Center
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Nashville, TN 37238-3001

Date Printed:	08/26/2005
Notice Date:	08/26/2005
Case Style:	Dorothy L. Davis v. J. Douglas Davis and Julie Ann Davis Griffing, Co-executors under the Last Will and Testament of J.D. Davis, deceased
Case Number:	M2003-02614-COA-R3-CV
Action:	Date Filed: 08/26/2005 Court Order Filed: Related to Mandate: Denying Motion to Recall Mandate::
Trial Court:	Davidson County Trial Court Number: Probate Court 02P-859

The Appellate Court Clerk's office has entered the above action in the Justice Information Tracking System.

CRV

C: Thomas O. Helton
Davidson County Circuit Court Clerk

C-2

IN THE COURT OF APPEALS
OF TENNESSEE AT NASHVILLE

DOROTHY L. DAVIS v. J. DOUGLAS DAVIS, ET AL.

Circuit Court for Davidson County
No. 02P-0859

No. M2003-02614-COA-R3-CV

ORDER

(Filed Aug. 26, 2005)

Respondents/Appellees J. Douglas Davis and Julie Ann Davis Griffin have moved this Court to recall the mandate that was issued in this matter on May 13, 2005. The basis for the motion is that movants have filed a petition for a Writ of Certiorari in the Supreme Court of the United States and that Court has advised the Clerk of this Court that the petition has been filed and placed on the docket. A memorandum was filed in support of the motion. The Petitioner/Appellant, Dorothy L. Davis, filed a memorandum in opposition to the motion to recall mandate.

Rule 42(c) of the Tennessee Rules of Appellate Procedure, provides that this Court may stay a mandate in cases in which review by the Supreme Court of the United States may be sought and section (d) of that rule provides that the power to stay a mandate includes the power to recall a mandate. Having reviewed the motion and supporting documents as well as the memorandum in opposition to the motion, it is determined that the motion is not well taken and the motion to recall mandate is denied. IT IS SO ORDERED.

/s/ David R. Farmer
DAVID R. FARMER,
JUDGE

/s/ Alan E. Highers
ALAN E. HIGHERS,
JUDGE

APPENDIX D

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN, as co-executors of the estate of J. D. Davis, deceased,

Plaintiffs,

v.

DOROTHY L. DAVIS,

Defendant. /

CASE NO.: 50 2005CA 006717 XXXX MB

COMPLAINT

(Filed Jul. 19, 2005)

Plaintiffs, J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN, as co-executors of the estate of J. D. Davis, deceased ("Plaintiffs"), sue the Defendant, DOROTHY L. DAVIS ("Defendant"), and allege:

JURISDICTION AND VENUE

1. Plaintiffs are co-executors of the estate of J. D. Davis, (the "Deceased"), as appointed in his Last Will and Testament. J. Douglas Davis is a resident of Brentwood, Williamson County, Tennessee. Julie Ann Davis Griffin is a resident of Winston-Salem, North Carolina. J. D. Davis ("Decedent")'s probate estate is being administered in the Seventh Circuit Court for Davidson County, Tennessee, Probate Division, Case Number 02P-859.

2. Defendant is over the age of eighteen (18) years, sui juris, and a resident of Palm Beach Gardens, Palm Beach County, Florida.

FACTS COMMON TO ALL COUNTS

3. On July 19, 1990, for mutual consideration and mutual protection of their respective assets, Decedent and Defendant executed a written agreement entitled "Ante-Nuptial Agreement," a copy of which is attached hereto as Exhibit "A" (hereinafter referred to as the "Agreement").

4. The Agreement was entered into and signed by both Decedent and Defendant in Palm Beach County, Florida.

5. Pursuant to the mutual terms of the Agreement, the individual assets of Decedent and Defendant were, at all times during their marriage, to be maintained separate and apart from each other's individual assets. Specifically, the Agreement provides that the parties' then-owned or thereafter acquired individual assets shall be "free from any claim of the other that may arise by reason of their marriage." The Agreement also provides that each spouse waives the right of election, homestead, and other statutory allowances upon the death of the other. Under Florida law, the language of the Agreement waives all marital rights including, but not limited to, the right of election, homestead, exempt property, and a year's support allowance.

6. The Agreement and the provisions therein are valid and enforceable pursuant to Section 732.702, *Florida Statutes* (2004). Although not required by the statute, the

Agreement recites that disclosure of the financial assets of each party was made to the other.

7. At all times material hereto, Decedent spent part of the year at his residence in Palm Beach County, Florida and part in Tennessee. Defendant always maintained her residency in Palm Beach County, Florida.

8. Decedent and Defendant were married in Palm Beach County on July 20, 1990. Both parties were widowed and had children and grandchildren from prior marriages.

9. On September 18, 2001, Decedent executed his Last Will and Testament in Nashville, Tennessee, leaving property to various individuals, including significant interests for the benefit of Defendant. A copy of Decedent's Last Will and Testament is attached hereto as Exhibit "B."

10. Decedent died in Palm Beach Gardens, Florida on May 9, 2002, at the age of 86 years.

11. On May 15, 2002, Plaintiffs filed a Petition to Probate the Last Will and Testament of J. D. Davis in the Probate Court of Davidson County, Tennessee. Decedent's Will was admitted to probate by Order of the Seventh Circuit Court for Davidson County, Tennessee, Probate Division ("Davidson County Probate Court). On May 15, 2002, Letters Testamentary issued to Plaintiffs.

12. On December 5, 2002, Defendant, in violation of the Agreement, filed in the Davidson County Probate Court a Petition for Elective Share; a Petition for Year's Support Allowance; a Petition for Exempt Property; and a Petition for Homestead. Thereafter, Plaintiffs filed a motion for summary judgment against Defendant's claims.

13. On April 23, 2003, the Davidson County Probate Court granted the motion for summary judgment and rejected Defendant's claims for elective share, homestead property, exempt property, and a year's support allowance. The Davidson County Probate Court ruled that the Agreement is valid and enforceable under Florida law and denied, with prejudice, Defendant's claims for elective share, homestead, exempt property, and a year's support allowance. A copy of the order is attached hereto as Exhibit "C."

14. Subsequently, on September 1, 2004, the Tennessee Court of Appeals reversed the decision of the Davidson County Probate Court, declining to enforce the Agreement. The Tennessee appellate court determined that, although the Agreement is valid under Florida law, it is unenforceable in Tennessee as a matter of public policy. A copy of the decision is attached hereto as Exhibit "D."

15. The Tennessee Supreme Court denied Plaintiffs' Application for Permission to Appeal and subsequent Petition for Rehearing.

16. In violation of the Agreement, Defendant is presently asserting claims against Decedent's estate for elective share, homestead, exempt property, and a year's support allowance before the Davidson County Probate Court.

COUNT I – BREACH OF ANTE-NUPTIAL AGREEMENT

17. Plaintiffs reallege paragraphs one (1) through sixteen (16).

18. This is an action for money damages for breach of contract in excess of Fifteen Thousand Dollars ($15,000.00), exclusive of interest and costs.

19. Decedent and Defendant entered into the written Ante-Nuptial Agreement attached hereto as Exhibit "A," in which Defendant agreed that Decedent's property would be " . . . free from any claim of the other that may arise by reason of their marriage . . . " *See* ¶ 1 of the Agreement.

20. In executing the Agreement, Defendant waived and released "the right of election, in accordance with the requirements of the Estates, Powers and Trust Law of the State of Florida or of the same or similar law of any other jurisdiction which might be applicable." *See* ¶ 2 of the Agreement.

21. Defendant breached the Agreement by imposing the right of election, homestead, exempt property, and a year's support allowance in the Davidson County Probate Court.

22. As a result of Defendant's breach of the Agreement, Decedent's estate has suffered damages in the form of attorneys' fees and legal expenses incurred in defending against Defendant's wrongful and unjustified claims and will continue to incur attorneys' fees and legal expenses.

23. Additionally, also as a consequence of Defendant's breach of the Agreement, Decedent's estate will sustain damages in the amount of Defendant's recovery for elective share, homestead, exempt property, and a year's support allowance.

WHEREFORE, Plaintiffs, J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN, as co-executors of the Estate of J. D. Davis, deceased, demand judgment against

Defendant, DOROTHY L. DAVIS, for compensatory damages, pre and post judgment interest, attorneys' fees, costs, and such other relief as is just and proper.

COUNT II - SPECIFIC PERFORMANCE

24. Plaintiffs reallege paragraphs one (1) through sixteen (16).

25. This is an action for specific performance seeking Defendant's compliance with the Agreement.

26. The Agreement is definite and certain in all of its essential elements, including its purpose and spirit.

27. Paragraph Eight (8) of the Agreement specifically provides that each party shall execute and deliver any additional documents reasonably required to carry the intention of the Agreement into effect.

28. Defendant has violated the Agreement by asserting claims which she waived and released when she executed the Agreement.

29. Decedent's estate will suffer irreparable injury and has no adequate remedy at law if Defendant is permitted to recover the elective share, homestead property, exempt property, and a year's support allowance because the Tennessee courts will not enforce the Agreement.

30. Plaintiffs seek specific performance by Defendant to comply with Paragraph Eight (8) of the Agreement. Defendant should be required to execute a valid release or instrument which will waive, nullify, and dismiss her pending claims in Tennessee for elective share, homestead, exempt property, and a year's support allowance.

WHEREFORE, Plaintiffs, J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN, as co-executors of the Estate of J. D. Davis, deceased, request the entry of an order requiring Defendant, DOROTHY L. DAVIS, to execute an instrument, which will waive, nullify, and dismiss her pending claims in Tennessee for elective share, homestead, exempt property, and a year's support allowance. Plaintiffs further request an order awarding them their attorneys' fees and costs incurred in prosecuting this action, together with such other relief as is just and proper.

COUNT III - DECLARATORY JUDGMENT

31. Plaintiffs reallege paragraphs (1) through sixteen (16).

32. This is an action for declaratory judgment pursuant to Section 86, *et seq.*, *Florida Statutes* (2004), seeking declaratory relief with respect to the parties' obligations under the Agreement attached hereto as Exhibit "A."

33. The Agreement specifically provides that the Decedent and Defendant's then-owned and thereafter acquired individual assets shall be "free from any claim of the other that may arise by reason of their marriage."

34. The Agreement further provides that each spouse waives the right of election, homestead, exempt property, and a year's support allowance.

35. Pursuant to Section 732.702, *Florida Statutes* (2004), the Agreement is valid and enforceable in the State of Florida.

36. Following the Decedent's death in Palm Beach County, Florida and the probating of Decedent's Will in Davidson County, Tennessee, Defendant violated the precise terms of the Agreement by asserting claims for elective share, homestead, exempt property, and a year's support allowance in the Davidson County Probate Court. Defendant is presently prosecuting these claims, which she intentionally and voluntarily waived when she executed the Agreement.

37. Although the Davidson County Probate Court initially enforced the Agreement against Defendant, the Tennessee Court of Appeals reversed the Probate Court, declining to enforce the Agreement. The Tennessee Court of Appeals ruled that, although the Agreement is valid under Florida law, it is unenforceable in Tennessee as a matter of public policy.

38. Given the rulings of the courts in Tennessee, Plaintiffs are uncertain of their rights and obligations regarding Defendant's present claims for elective share, homestead, exempt property, and a year's support allowance in the Davidson County Probate Court.

39. A present and bona fide dispute exists between the parties regarding their current obligations under the Agreement.

40. There is an actual and present need for a declaration of rights with respect to the parties' obligations under the Agreement.

WHEREFORE, Plaintiffs, J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN, as co-executors of the Estate of J. D. Davis, deceased, request that this Court take jurisdiction over the parties and declare that (1) the

Agreement is valid and enforceable in every respect; (2) Defendant, DOROTHY L. DAVIS, has no right to pursue claims for elective share, homestead, exempt property, and a year's support allowance in the Davidson County Probate Court; (3) Defendant shall execute an instrument, which will waive, nullify, and dismiss her pending claims in Tennessee for elective share, homestead, exempt property, and a year's support allowance; and (4) should Defendant recover in the Davidson County Probate Court, Plaintiffs shall have the right to sue Defendant in Florida for all damages arising from her breach of the Agreement, including but not limited to damages in the amount of Defendant's recovery for elective share, homestead, exempt property, and a year's support allowance, together with attorneys' fees, costs, and such other relief as is just and proper.

Dated: July 19, 2005

SHUTTS & BOWEN LLP
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By: /s/ Arnold L. Berman
Arnold L. Berman
Florida Bar No.: 236241
Vincent E. Miller
Florida Bar No.: 126497

APPENDIX E

**IN THE SEVENTH CIRCUIT COURT
OF DAVIDSON COUNTY, TENNESSEE
(PROBATE DIVISION)**

IN RE:	)	
ESTATE OF J.D. DAVIS	)	
Deceased,	)	**Docket Number: 02P859**
DOROTHY L. DAVIS,	)	**Notice of Entry Required**
Movant/Surviving Spouse,	)	
v.	)	
J. DOUGLAS DAVIS and JULIE ANN DAVIS GRIFFIN,	)	
Respondents/Co-Executors,	)	

MEMORANDUM OPINION AND ORDER

(Filed Aug. 26, 2005)

This matter came before the Court on August 12, 2005 upon the Motion to Compel Co-Executors to Dismiss Lawsuit, and for Removal of Co-Executors filed by Dorothy L. Davis as surviving spouse of the deceased J.D. Davis. After a full hearing on this Motion, the Court took this matter under advisement in order to fully consider the oral arguments in conjunction with the Memoranda supplied by both parties.

The Movant is Dorothy L. Davis who is the surviving spouse of J.D. Davis. Dorothy Davis was married to the Deceased for eleven years prior to his death. J. Douglas Davis and Julie Ann Davis Griffin are the Respondents to

this Motion in their capacity as Co-Executors of the Estate of J.D. Davis, their late father.

The Movant filed this Motion seeking to dismiss a lawsuit commenced by the Estate in Florida against Dorothy Davis and to have the Co-Executors removed from their fiduciary capacities. Respondents filed suit in Circuit Court for Palm Beach County, Florida, seeking to have the Florida Circuit Court enforce an ante-nuptial agreement entered into by the Movant and the Deceased one day prior to their marriage.

Based on the reasoning set forth below, it is the opinion of this Court that the relief requested in the Motion shall be denied. However, it is the opinion of this Court that all proceedings in the Florida litigation shall be stayed pending a final determination of the appeal filed and perfected by the Estate to the United States Supreme Court.

There are two issues which this Court must consider. The first is whether the Co-Executors of this Estate should be removed from their fiduciary capacities. The Court must also determine if the lawsuit in Florida filed on behalf of the Estate should be dismissed.

The Movant and the Deceased met in the Spring of 1989. They were engaged to be married the following summer of 1990. During this period the Deceased maintained his primary domicile in Davidson County, Tennessee. He would spend six months per year in Tennessee and six months per year in Florida. One day prior to their wedding the parties entered into an ante-nuptial agreement in the office of the Deceased's attorney. The Movant argued that she was not made fully aware of the Deceased's wealth prior to the execution of this ante-nuptial

agreement. In the ante-nuptial agreement, the Movant waives her rights to any possible elective share, year's support, homestead or exempt property which she may statutorily possess at the time of the Deceased's death.

Mr. Davis died on May 9, 2002. On May 15, 2002 the Co-Executors filed a Petition to Probate the Will of J.D. Davis in this Court. On December 5, 2002 the Movant filed a Petition for Elective Share, Exempt Property, Homestead, and Year's Support Allowance. The Co-Executors filed a responsive pleading in which they stated that the ante-nuptial agreement entered into by the parties barred such a petition. On April 23, 2003, the Honorable Frank G. Clement, Jr. agreed with the Estate and entered an Order on the Estate's Motion for Summary Judgment, dismissing the Movants' Petition for Elective Share, Exempt Property, Homestead, and Year's Support Allowance. A Notice of Appeal was filed by the Movant and the Court of Appeals reversed the trial court finding that this ante-nuptial agreement was not enforceable in Tennessee, because it violated the public policy of this state. The Court of Appeals held that under Tennessee law, a full financial disclosure was required prior to the execution of such document and that this ante-nuptial agreement did not satisfy this requirement. An Application for Permission to Appeal to the Tennessee Supreme Court was then filed by the Estate. That Application was denied by the Tennessee Supreme Court. Subsequently, the Estate filed a Petition for Rehearing with the Tennessee Supreme Court which was also denied. The Estate has now filed a Petition for Writ of Certiorari to the United States Supreme Court. The Estate has also filed the Florida lawsuit seeking to have the Florida Circuit Court of Palm Beach County enforce the questioned ante-nuptial agreement.

This Court will first address the issue of the appropriateness of removing the Co-Executors. During the hearing on this Motion, this Court ruled from the bench that the Movant had not carried the significant burden required to compel this Court to remove a fiduciary. Tennessee Code Annotated § 35-15-706 pertains to the removal of an Executrix. The statute contains in part:

> (a) The settlor, a cotrustee, or a qualified beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
>
> (b) The court may remove a trustee if:
>
> (1) The trustee has committed a serious breach of trust;
>
> (2) Lack of cooperation among cotrustees substantially impairs the administration of the trust;
>
> (3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
>
> (4) There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.
>
> T.C.A. §§ 35-15-706

This Court finds that none of the specified reasons for removal of an Executrix have been satisfied at this time.

The remaining issue this Court now discusses deals with the dismissal of the pending lawsuit in the Florida

Circuit Court. In light of the pending Petition for Writ of Certiorari to the United States Supreme Court, the Court finds it would be imprudent to dismiss the lawsuit in Florida. The Court does not want to upset the tenuous postures in which the parties are presently situated due to this Writ of Certiorari, thus, this Motion to Dismiss is denied.

This Court maintains proper jurisdiction over the Probate Estate of J.D. Davis and the Co-Executors of such Estate. J.D. Davis was domiciled in Davidson County, Tennessee at the time of his death, as evidenced by the Petition to Probate the Will of J.D. Davis filed by the Co-Executors. The Co-Executors submitted themselves to the jurisdiction of this Court upon their application and acceptance of appointment to their fiduciary roles. An Executor properly qualified before this Court acts as an officer of this Court and is authorized to act by this Court. *Pritchard on Wills and Administration of Estates* §36 (5th ed. 2004). This Court has the authority and responsibility to oversee the administration of all estates.

Tennessee Rules of Civil Procedure 62.07 affords this Court the discretion to order a stay of proceedings in exceptional cases as the court deems proper. With a pending Writ to the U.S. Supreme Court which will bring a final resolution to the appropriateness of the appellate orders of this state, this Court finds that this is an exceptional circumstance which warrants a Stay of Respondents lawsuit pending in Florida. This Court finds that a temporary injunction shall issue against the Co-Executors of this Estate in accordance with TRCP 65.04 which restrains and enjoins them from pursuing the Florida litigation without prior approval from this Court and shall remain in effect pending further orders of this Court.

IT IS SO ORDERED.

/s/ Randy Kennedy
Judge Randy Kennedy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of August, 2005, a true and correct copy of the foregoing **Memorandum Opinion and Order** was forwarded to all of the following counsel of record:

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F-1

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO.:
50 2005 CA 006716 XXXX MB

J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, as co-executors of the estate of J.D. Davis, deceased,

Plaintiffs,

vs.

DOROTHY L. DAVIS,

Defendant. /

DEFENDANT'S MOTION TO ENLARGE TIME TO RESPOND TO COMPLAINT

(Filed Sep. 27, 2005)

Defendant, Dorothy L. Davis, moves pursuant to Rule 1.090 of the Florida Rules of Civil Procedure to enlarge the time within which she must respond to the complaint in this action, and states:

Background

1. As alleged in the complaint, the plaintiffs are the co-executors of the estate of J.D. Davis pending in the Seventh Circuit Court for Davidson County, Tennessee, Probate Division, Case Number 02P-859. (Compl. at ¶ 1).

2. The defendant is the widow of J.D. Davis, the decedent in the Tennessee probate proceeding.

3. Plaintiffs' claims in this action are part of their effort to enforce an ante-nuptial agreement which the defendant allegedly entered with the decedent.

4. On September 2, 2004 – before the plaintiffs filed this action in Florida – the Tennessee Court of Appeals held that the ante-nuptial agreement was unenforceable in the Tennessee probate proceeding. The Tennessee Supreme Court twice denied review of the decision of the Tennessee Court of Appeals.

5. Subsequently, on July 19, 2005, the plaintiffs filed this Florida action alleging a breach of the same ante-nuptial agreement which, approximately ten months before, the Tennessee Court of Appeals declared unenforceable. The plaintiffs also filed a petition for writ of certiorari in the United States Supreme Court seeking to overturn the decision of the Tennessee Court of Appeals. The plaintiffs' certiorari petition remains pending.

6. After the plaintiffs filed this action in Florida, the defendant filed a motion in the Tennessee probate proceeding seeking to compel the plaintiffs to dismiss this action. At nearly the same time, the plaintiffs filed a motion with the Tennessee Court of Appeals to stay the Tennessee proceedings pending a ruling on their petition to the United States Supreme Court.

7. In the meantime, the parties agreed to enlarge the time for the defendant to respond to the complaint in this Florida action. Pursuant to the parties' agreement, the defendant's response to the complaint filed in this action was to be served no later than thirty days after entry of an order on either the defendant's motion to compel or the plaintiffs' motion to stay.

The Tennessee Injunction

8. On August 26, 2005, the Tennessee probate court enjoined the plaintiffs from pursuing this Florida action until further order of the Tennessee probate court. Also, the Tennessee Court of Appeals denied plaintiffs' motion to stay the Tennessee probate proceeding.

9. Accordingly, the plaintiffs – whose authority as co-executors of the estate of J.D. Davis is governed by the Tennessee probate court – are prohibited from prosecuting this Florida action pending a further ruling from the Tennessee probate court.

An Enlargement Of Time Is Appropriate

10. Rule 1.090(b) of the Florida Rules of Civil Procedure permits a court to enlarge the time within which an act is required for good cause.

11. In light of the plaintiffs' current inability to prosecute this action, good cause exists to enlarge the time within which the defendant must respond to the complaint in this action.

12. The requested enlargement will preserve the parties' and the Court's resources and is consistent with the injunction entered by the Tennessee probate court.

13. If and when the injunction is lifted, the parties can litigate the issues raised by the complaint, including whether the plaintiffs are entitled to bring an action in Florida to enforce the ante-nuptial agreement that was previously declared unenforceable by the Tennessee Court of Appeals.

WHEREFORE, the Defendant, Dorothy Davis, respectfully requests that this Court enter an order enlarging the

time within which she must respond to the complaint so that her response is due to be served no later than thirty days after the Tennessee probate court lifts the current injunction which prohibits plaintiffs from prosecuting this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via regular mail to the following on this **26th** day of September, 2005:

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No. 05-162

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In The
Supreme Court of the United States

ESTATE OF J. D. DAVIS AND J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS,

Petitioners,

v.

DOROTHY L. DAVIS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee, Middle Section At Nashville

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RESPONDENT HAS FAILED TO EXPLAIN WHY THIS CASE IS NOT DESERVING OF REVIEW

In their Petition, Petitioners asserted that "FFC places limits on the ability of a state to apply its 'public policy' to defeat claims originating from other states." (Pet. at 17) In her Brief in Opposition (BIO), Respondent acknowledges this critical threshold point: "[T]here are certain limits on a state's power to pursue its public policy by applying its own law." (BIO at 19) The rest of the substantive component of Respondent's BIO is a merits brief.

Respondent acknowledges that a key issue is whether Tennessee "is competent to legislate" on the matter in issue, noting that "[t]his principle cuts forum states a wide swath." (BIO at 19) True – a wide but not unlimited swath, and the precise contours of that swath are in need of development and elaboration to avoid the kind of proliferation of litigation reflected in this proceeding. That is why this case is certworthy, raising issues both of pragmatic significance and far-reaching constitutional import. It addresses the scope of a forum state's ability to trump its own choice-of-law rules by use of the *deus-ex-machina* "public policy" doctrine – a doctrine that methodologically does not consider or account for FFC analysis.

Petitioners seek review because "there has not been much development regarding the 'nature' of 'relevant' contacts" under this Court's FFC jurisprudence. The "Court has rejected an approach to FFC that encompasses a balancing of sovereign interests among competing states;" this suggests that "determining how 'to delimit spheres of state legislative competence'" must be "more categorical in character" (*e.g.*, marital domicile). (Pet. at 26-28) This case provides an excellent vehicle for addressing these fundamental aspects of FFC doctrine. (Pet. at 11-13, 16-28)

In this case, the Tennessee Court of Appeals did not consider crucial elements of FFC analysis: (i) the nature of

Florida's interest in giving effect to a reciprocal antenuptial agreement entered into in Florida, particularly when the party seeking to breach that agreement is, by her own choice (a choice not available at common law), a Florida domiciliary; (ii) the nature and relevance of Tennessee's interest in abrogating the reciprocal antenuptial agreement because of purported lack of disclosure; (iii) the competence of Tennessee to legislate protectively (*i.e.*, substantively) on behalf of a non-domiciliary when that domiciliary's jurisdiction has expressly chosen to enforce antenuptial agreements even without asset disclosure; and (iv) fairness considerations – the expectations of the parties – that comprise an important component of FFC analysis.

The result of the Court of Appeals' decision is to upset the expectations of this couple – to provide for their own children through their own resources. The decision also turns a symmetrical agreement – each spouse's children look to the resources of their parent – into a strikingly asymmetrical agreement: Ms. Davis' children maintain their financial protection under the agreement but Mr. Davis' children do not. Had Ms. Davis pre-deceased Mr. Davis, her domiciliary status in Florida would have assured that her will was probated in Florida, and the Florida courts would have (properly) given effect to the antenuptial agreement against any putative claim by Mr. Davis or his children.

None of these factors was considered or, methodologically, could be considered under the Court of Appeals' approach. Review is needed by this Court to clarify the "nature" of "relevant" factors in FFC analysis and how to incorporate FFC fairness considerations into the analysis.

On the merits, Respondent echoes both Dr. Pangloss and Chicken Little. The Panglossian dimension is that the case is controlled by recent precedent. (BIO at 17) The Chicken Little dimension is the plea not to unsettle "succession law." (BIO at 27) Neither stance is apropos.

This Court's recent precedent does not render the matter uncertworthy. The concession (BIO at 19) that

limits to state authority exist under FFC and that the Tennessee decision can only be sustained if Tennessee is competent to legislate on the matter indicates that the issue of competence to legislate herein is the critical issue for review; no cited (or uncited) case has resolved that question. Indeed, this case presents the very case foreseen and not addressed in *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003) – "a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State."

Respondent asserts that Tennessee has "particularly significant" interests in the "institution of marriage." But this case does not involve the law of wills. It is about the validity of a pre-marital contract that, under Tennessee choice-of-law principles, would normally be governed by Florida law. Respondent wonders what Florida's interest in enforcing the antenuptial agreement is when enforcement "diminish[es] the take of one of its domiciliaries." (BIO at 23) This speaks volumes about Respondent's view of her marital obligations, about the "trust and confidence" she "bring[s] to the institution of marriage." (BIO at 22) The nature of Florida's interest will be developed upon plenary review (if granted), but a state like Florida that consciously promotes reciprocal antenuptial agreements without asset disclosure has strong interests in giving effect to those agreements, even when, in a particular case, one of its domiciliaries faces a short-term disadvantage from enforcement. Just by posing the question, Respondent demonstrates that different states may have different interests with respect to domiciliaries than non-domiciliaries, something that the Court of Appeals' decision did not consider (and had no methodology for considering).

Nothing in this case will unsettle "succession law." Respondent's cases (BIO at 25-27) can be explained as applying forum rules of procedure – rules regarding oral evidence and the formalities of executing an agreement. This Court has adopted the procedure/substance distinction in FFC cases, allowing forum states to apply their own rules of procedure. *Sun Oil Co. v. Wortman*, 486 U.S.

717 (1988). The issues herein are not procedural but substantive – Tennessee's ability to give effect to protective policies for non-domiciliaries when the law of the non-domiciliary's jurisdiction applies under forum choice-of-law rules and when the non-forum jurisdiction does not recognize those protective policies. (Pet. at 21-22) How forum states must treat out-of-state contracts when the party seeking protection is a married non-domiciliary is quite unsettled[1] and is a reason for this Court's granting review.

THIS COURT HAS JURISDICTION

Respondent asserts that this Court lacks jurisdiction for two reasons: (i) the constitutional issues were not raised in the state courts; (ii) the decision below was not a final judgment. Neither assertion withstands analysis.

A. The Full Faith and Credit Clause Issue Was Properly Raised Below.

Lower courts need only be able to discern that "a certain provision of the Constitution" was relied on by the party seeking review. *Green Bay & Mississippi Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 68 (1898). Respondent acknowledges that Petitioners "did, in fact, raise a Full Faith and Credit [FFC] claim." (BIO at 11) That is sufficient.

Respondent asserts that the FFC claim, as argued below, was "strikingly different" than the FFC claim raised in the Certiorari Petition. (BIO at 11) This is immaterial. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee*

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[1] *In re Bulova's Will*, 220 N.Y.S.2d 541 (App. Div. 1961), which dealt with the formalities in executing an agreement (a matter of procedure), both spouses were New York domiciliaries. Even in that context, the court recognized that the resolution of the issues might be different if the parties were non-domiciliaries. *Id.* at 547 n.3. In this case, Respondent is now and has always been a domiciliary of Florida, not Tennessee.

v. City of Escondido, 503 U.S. 519, 534 (1992). Petitioners are permitted to make "separate arguments in support of a single claim." *Id.* at 535. Thus, having raised the FFC issue below, Petitioners may "formulate[] any argument they like[] in support of that claim here." *Id.*

Petitioners properly raised an FFC claim and did much more than the minimum required. They raised the FFC issue in the Court of Appeals. (Appellees' Brief at 12-13, App. A-2) (noting that Tennessee must give FFC to acts of other states). No decision had called FFC into question at that time, yet the FFC constraints on reversing the trial court's summary judgment order were clearly before the Court of Appeals. Respondent acknowledged this: "Contrary to Appellees' assertion, Tennessee courts are not required to give full faith and credit to laws of another state that are violative of clearly recognized Tennessee public policy." (Reply Brief of Plaintiff-Appellant at 10-12, App. B-2)

Once the Court of Appeals ruled, thereby raising and also clarifying the FFC issue, Petitioners included the FFC claim as the first question presented for review in their Application for Permission to Appeal to the Tennessee Supreme Court. (Application for Permission to Appeal at 9-16, App. C-2) Petitioners asserted (citing authority) that FFC places "limits" on the "extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another." (*Id.* at 10, App. C-4) The Court of Appeals' decision had "constitutional infirmities" under FFC. (*Id.* at 19, App. C-15)

That the FFC issue was before the Tennessee Supreme Court is also established by Ms. Davis' response to Petitioners' Application for Permission to Appeal: The estate's executors "maintain that the Court of Appeals' decision is unconstitutional in that it violates [FFC]. . . . In their presentation of the case law interpreting and applying [FFC], however, the Respondents/Appellants make an important analytical error." (Answer in Opposition to

Respondents/Appellants' Application for Permission to Appeal at 6, App. D-2; *see also id.* at 16-17, App. D-11[2])

In short, the FFC issue was presented to and was before the Tennessee courts in this matter.[3]

B. The Decision of the Court of Appeals was Final.

Respondent asserts that the finality rule has not been satisfied. (BIO at 5-16) The cases do not support that claim.

The operative decision under review is that of the Tennessee Court of Appeals. Where the highest court of a state refuses to review the judgment of an inferior court, as herein, the judgment of the inferior court becomes the final judgment for purposes of review by this Court. *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 109 (1963).

For decades, this Court has given a "practical rather than a technical construction" of 28 U.S.C. §1257(a), *Cohen v. Beneficial Industry Loan Corp.*, 337 U.S. 541, 546 (1949), using a "pragmatic approach" in determining finality. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). In determining finality, "the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying

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[2] Respondent asserts that Petitioners did not specify where and when the FFC issue was raised below. (BIO at 16-17) Any such omission is curable and the details provided above effect that cure. In *Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997), the Court treated the requirements of Rule 14.1(g)(i) as curable, even at the merits stage (but not therein cured). The specification in this Reply Brief either comports with the requirements of Rule 14.1(g)(i) as occurring at the Certiorari stage or effectively cures any omission by providing the detailed required information.

[3] To the extent that there remains any ambiguity on this issue – and there should be none – this Court should provide Petitioners with an opportunity to seek a Certificate from the Tennessee courts attesting to the fact that the FFC issue was presented to and properly before them. For a case following that procedure, *see Allenberg Cotton Co., Inc. v. Pittman*, 414 U.S. 1109 (1973); 419 U.S. 20 (1974).

justice by delay on the other.'" *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). The costs of delay in this matter are considerable, potentially draining the estate's assets through litigation expenses. *Cf. Marshall v. Marshall*, 392 F.3d 1118 (9th Cir. 2004), *cert. granted*, No. 04-1544; *Hughes Tool Co. v. TWA, Inc.*, 409 U.S. 363, 364 n.1 (1973); *id.* at 389-393 & n.10 (Burger, C.J., dissenting) (noting extraordinary expense and inefficiency from failure to resolve threshold issue of federal law, with Court dismissing certiorari and remanding for trial, and then holding that entire litigation was for naught because federal law granted immunity). Respondent proposes an approach with high litigation costs and the risk of conflicting multi-jurisdictional judgments as in *Marshall*, which this Court will review. But (like most) this estate is without the resources of that one.

In *Cohen*, a case with choice-of-law issues analogous to those herein, the issue was whether a state fee-shifting statute applied in a federal court sitting in diversity. *Cohen v. Beneficial Industry Loan Corp.*, 337 U.S. 541, 543-44. The District Court held not, declining to require security; the Court of Appeals reversed. *Id.* at 545. Even though the case had not proceeded beyond the security issue, this Court granted review. *Id.* at 546-47. The claims were from a "final disposition" of a discrete federal choice-of-law question – whether the state statute was substantive or procedural in a diversity action. It serves the policy of 28 U.S.C. §1257(a) for this Court to determine such discrete threshold federal issues as choice-of-law, jurisdiction, or venue – matters "anterior to the merits" – so that litigants are not subjected "to long and complex litigation which may all be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (regarding venue); *see also Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 548-50 (1963) (regarding state court jurisdiction).

Respondent's position, that review is premature, would put the parties to great and needless expense and run the "danger of denying justice by delay." *Gillespie*, 379 U.S. at 153. "Immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Cox*, 420 U.S. at 477-78. If unreviewed, the Court of Appeals' decision may result in further proceedings in Tennessee under an unconstitutional choice-of-law principle; simultaneously, it has spurred litigation by the estate in Florida that is likely unnecessary if Florida law controlled the Tennessee litigation. And it is doubtful that Respondent can prevent the Florida litigation from proceeding. *See* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 823 (1969).

Contrary to Respondent's assertion, the related but separable Florida litigation does not deprive the Court of Appeals' decision of finality. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 125 (1945). All that Tennessee can decide is that the antenuptial agreement is unenforceable in Tennessee, not that it is invalid or unenforceable in Florida. What lack of review will do, however, is leave intact and unscrutinized a troubling choice-of-law precedent that will continue to bind these proceedings in Tennessee. Since that decision may avoid review, "the battle over the constitutionality" of the decision could be "lost as far as this case is concerned." *North Dakota St. Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 163 (1973); *Cox*, 420 U.S. at 485-86 & n.13. Such a decision is final. It leaves intact an erroneous FFC judgment on an important matter of federalism. *Hughes v. Fetter*, 341 U.S. 609, 611-12 (1951).

Where additional proceedings are to occur, finality exists when, as here, there is a "final judgment on the federal issue for purposes of state-court proceedings," and there are "no other federal issues to be resolved." This assures that there is "no probability of piecemeal review